(3)

No. 08-1232

In the Supreme Court of the United States

CARLYLE FORTRAN TRUST,

Petitioner,

v.

NVIDIA CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY

Respondents Gordon Campbell, James Whims, James Hopkins, Scott Sellers and Alex Leupp are former directors or officers of 3dfx Interactive, Inc. ("3dfx"), a publicly traded California corporation that filed for bankruptcy in October of 2002, slightly less than two years after entering into an agreement to sell the majority of its assets to a former competitor, nVidia Corporation ("nVidia"). Separate counsel represents Mr. Richard Heddleson, who was also a former officer of 3dfx. However, in the proceedings below, all of the former directors and officers of 3dfx – Gordon Campbell, James Whims, James Hopkins, Scott Sellers, Alex Leupp *and* Richard Heddleson – were referred to collectively; accordingly, in this brief in opposition, they are all also collectively referred to as the "3dfx D&Os."

Respondents submit this brief in opposition to fulfill their obligation under Supreme Court Rule 15 to point out any perceived misstatements of fact or law contained in the petition.

The petition misstates the law in its contention that there are intra-circuit and inter-circuit conflicts on the issue of whether a bankruptcy trustee has standing to pursue redress for actions that in the first instance injured a debtor corporation, but that derivatively caused injury to the corporation's creditors. The decisions are unanimous in agreeing that the trustee has standing. The decisions merely differ in the words they use to

describe the realm of lawsuits that a bankruptcy trustee is authorized to pursue.

These respondents also believe that the petition's recitation of the facts and proceedings below is misleading, because the petition improperly omits any mention of the most important and legally dispositive event for these respondents: the 3dfx D&Os entered into a settlement with the bankruptcy trustee.

Indeed, the 3dfx D&Os agreed to pay $5.5 million to the 3dfx bankruptcy estate in order to buy peace and end the litigation against them. They submitted their settlement agreement to the bankruptcy court for approval, and they provided notice to all of 3dfx's creditors, including petitioner, with the full opportunity for petitioner to voice any objection to the trustee's jurisdiction or authority to enter into the proposed agreement. When no objections were voiced, and after the settlement had been approved by the bankruptcy court and the time for any appeal had expired, these respondents paid the $5.5 million settlement sum to the bankruptcy trustee and, in return, received a full release of all claims against them, including the precise claims that petitioner now seeks to resurrect and reassert.

This brief in opposition thus first provides a Statement of the Case that includes the additional facts that petitioner chose to ignore. It then addresses the first of the four questions presented in the petition, since it is only that single question that even conceivably could impact the Ninth Circuit's

ruling, in an unpublished opinion, that the trial court properly dismissed petitioner's claims against the 3dfx D&Os.

The other three questions raised in the petition deal with claims and issues against other parties, and do not involve the 3dfx D&Os. Respondents accordingly defer to the other parties to adequately address those topics in their briefs to this Court.

The one item that could conceivably impact these respondents – the first of the four questions identified in the petition – is the question whether there exist intra-circuit or inter-circuit conflicts regarding the proper application of this Court's decision in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972) to situations where a debtor corporation has suffered an injury that also derivatively has harmed its creditors. As this brief demonstrates, the purported conflicts do not exist.

The test for determining when a trustee is suing on behalf of a bankruptcy estate (as opposed to suing on behalf of creditors) is clear: if a trustee seeks to recover for harm or for the dissipation of assets that in the first instance impacted the bankrupt company, then he is properly suing on behalf of the bankruptcy estate. This is true even if the same harm was also felt by creditors, or if the same transactions had a ripple effect that left the bankrupt company with insufficient funds to pay some creditors.

Admittedly, the words used to describe the test have changed in the last decade. But the substance has always been the same. And it is only by taking words from various decisions out of context and without reference to the overall framework that petitioner is able to pretend that any conflict exists.

Petitioner's most prominent error is to focus solely on the word "general" used by the Ninth Circuit Bankruptcy Appellate Panel to distinguish between a particularized injury caused to an individual creditor (for which the Trustee cannot seek redress) and a "general" injury that impacts *all* creditors (for which the Trustee may properly seek redress.) Petitioner improperly conflates this use of the word "general" with the phrase "general cause of action" that has been used in other decisions to distinguish between a creditor's regular cause of action and a creditor's derivative claim.

As a closer look at the case law demonstrates, the various decisions are not truly inconsistent, and in using the word "general" were not addressing the same thing. Because the cases that petitioner relies upon to demonstrate inter-circuit and intra-circuit conflicts do not actually conflict with each other, there is no reason for this Court to grant the petition.

Petitioner has not, and cannot, make the showing required for the grant of review on certiorari by Supreme Court Rule 10. The petition should accordingly be denied.

STATEMENT OF THE CASE

In the summer of 2000, the 3dfx D&Os faced a crisis: their company was imploding and hemorrhaging cash at a rate that could only last a few months at most. Faced with few alternatives, the 3dfx D&Os agreed to sell 3dfx's assets to nVidia, another Silicon Valley company, for a combination of $70 million in cash and 1 million shares of nVidia stock. The deal included a caveat: nVidia would only transfer the million shares of stock if 3dfx was first successfully able to retire its debts and dissolve.

3dfx was *not* successful in retiring its debts, however, and ceased paying rent to petitioner, its landlord, in January of 2002. On May 10, 2002, petitioner filed a lawsuit based upon its rent loss in the Superior Court of the State of California in and for the County of Santa Clara. That complaint included claims against 3dfx, nVidia and the directors and officers of nVidia. Contrary to petitioner's recitation of facts in its petitioning Statement of the Case, that complaint did *not* include any claims against the 3dfx D&Os.

On October 15, 2002, 3dfx filed a Chapter 11 bankruptcy petition. Despite the constraints imposed by the automatic bankruptcy stay, on December 20, 2002 petitioner filed an amended complaint in the Santa Clara Superior Court against 3dfx, nVidia, the nVidia directors and officers and also the 3dfx D&Os.

Two weeks later, on January 3, 2003, nVidia removed the Santa Clara Superior Court action to the bankruptcy court.

On September 17, 2003, the bankruptcy trustee filed a complaint against the 3dfx D&Os in the Superior Court of the State of California in and for the County of San Mateo. The trustee's lawsuit complained about the structure of the nVidia transaction and (just like petitioner) asserted that in agreeing to the deal, the 3dfx D&Os had (among other things) breached their fiduciary duties.

After a year of intense litigation, in September of 2004, the 3dfx D&Os reached a settlement with the trustee, agreeing to pay $5.5 million in exchange for a complete release of all claims that had been or could have been asserted against them.

That settlement was submitted to the bankruptcy court, and due notice of the settlement terms were provided to all of 3dfx's creditors, including petitioner. Neither petitioner, nor any other creditor, objected to the proposed settlement, and on November 19, 2004, the settlement was duly approved by the bankruptcy court.

After the period for any appeal from the approval order had expired, the 3dfx D&Os paid $5.5 million to the bankruptcy estate and, in exchange, the bankruptcy trustee provided to the 3dfx D&Os a full and complete release of all possible claims against them, expressly including "any liability by

Defendants for allegedly participating in the transfer of assets or sale or merger to/with Nvidia Corporation, whether as a fraudulent conveyance or otherwise."

On December 13, 2004, the bankruptcy trustee also filed a dismissal with prejudice of his complaint against the 3dfx D&Os.

Relying upon the dismissal and the full release provided by the bankruptcy trustee, the 3dfx D&Os then moved to dismiss the claims asserted by petitioner against them. On December 15, 2006, the 3dfx D&Os' motion to dismiss was granted without leave to amend.

That dismissal order was affirmed by the Ninth Circuit on November 25, 2008.

ARGUMENT

I. THE INTRA-CIRCUIT AND INTER-CIRCUIT CONFLICTS THAT PETITIONER ASSERTS DO NOT ACTUALLY EXIST

In *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972), this Court first addressed the question of whether a bankruptcy trustee had standing to file a lawsuit on behalf of a debtor corporation's bond holders against a third party indenture trustee whose misconduct contributed to the losses sustained by those creditors. This Court concluded that a bankruptcy trustee does not have that standing.

The Court's analysis recognized the long-standing rule that a bankruptcy trustee has the authority to pursue any cause of action that the debtor corporation (Webb & Knapp) could have asserted prior to filing for bankruptcy. *Caplin*, 406 U.S. at 429. The Court's decision then noted that while Congress had recently enacted legislation that allowed bondholders themselves to sue a negligent indenture trustee, there was no such remedy available to the debtor corporation itself. The Court observed:

> If petitioner could sue on behalf of Webb & Knapp, the statute that requires that he report possible causes of action to the court would require mention of this cause of action.

> Moreover, petitioner has brought every conceivable claim that is available to him as trustee. Not only has he brought this action against the indenture trustee, **but he has also sued former officers of Webb & Knapp charging them with waste.** [Record Citation.] **Certain settlements have apparently been made in some of these actions.**

Caplin, 406 U.S. at 429, fn. 20, emphasis added.

Petitioner claims that there is a split of authority on whether *Caplin* is properly interpreted to prevent a bankruptcy trustee from suing various parties, like the respondents on this petition. But as the issue relates to the 3dfx D&Os, there cannot possibly be any confusion. For on its face, this Court's decision in *Caplin* recognized the authority of a bankruptcy trustee to sue and settle with the directors and officers of a debtor corporation.

At a minimum, petitioner has framed its petition too broadly. Indeed, petitioner has neither now nor ever cited a single decision that barred a bankruptcy trustee from suing and settling with the directors and officers of a debtor corporation.

Moreover, even apart from petitioner's error in casting its petition too widely, so that it encompasses the 3dfx D&Os for whom the *Caplin* decision cannot provide any legitimate confusion, petitioner also errs in seeing conflicts within and between the circuit

courts of appeals. For the conflicts that petitioner posits are based solely upon the use by different courts of different words to describe the same principles.

All of these decisions seek to differentiate between a debtor company's causes of action, which the bankruptcy trustee may properly pursue even though doing so will ultimately benefit creditors, from a creditor's individual cause of action, which the Trustee is barred under *Caplin* from pursuing.

That was the task that the court in *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378 (B.A.P. 9th Cir. 1997) directly confronted in differentiating between what it called "general" (company) claims and personal (creditor) claims:

> A cause of action is "personal" if the claimant himself is harmed and no other claimant or creditor has an interest in the cause. *Citation.* A general claim exists "[i]f the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors." *Citation.* "If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors

> are bound by the outcome of the trustee's action."

In re Folks, 211 B.R. at 387.

Latching onto the *Folks* court's distinction between "general" and "personal" claims, petitioner asserts that *Folks* conflicts with *Williams v. California First Bank*, 859 F.2d 664 (9th Cir. 1988). But petitioner misreads *Williams* and improperly focuses upon the decision's use of the word "general" without understanding the context of that usage.

Williams involved a Ponzi scheme used by a seafood distributor to fund its business. The distributor sold investment contracts guaranteeing a high rate of return (10% per month), and then paid the returns by selling more investment contracts. Ultimately, of course, the pyramid collapsed, and the seafood distributor filed for bankruptcy protection.

Many of those who had purchased investment contracts that had not been repaid banded together to pursue California First Bank. The bank had been the depository for the funds raised by the fraudulent investment contracts, and the bank was arguably complicit in the seafood distributor's fraud. The creditors who had banded together assigned their causes of action against California First Bank to the bankruptcy trustee, who then endeavored to sue on behalf of the creditors as their assignee. This was, the Ninth Circuit held, barred by *Caplin*. And in discussing *Caplin*, the Ninth Circuit noted that a

trustee lacks the authority to assert "general causes of action" on behalf of creditors. *Williams,* 859 F.2d at 667.

Petitioner pretends that the *Williams* decision is inconsistent with *Folks,* and that the phrase "general causes of action" used by the *Williams* court is the same thing as a "general claim, with no particularized injury arising from it" – the phrase used in *Folks.* But petitioner is plainly wrong; and the *Folks* test would have led to the precise same result.

For the creditors in *Williams* who had purchased investment contracts were the *only* ones who were injured by the bank's failure to blow the whistle on the fraudulent Ponzi scheme. Every other creditor who dealt with the seafood distributor *benefited* from the Ponzi scheme, for the numerous investment contracts raised the operating capital that the distributor used to pay its bills. Applying the *Folks* test, one would characterize the claims of those who had purchased investment contracts as personal claims based upon each contract holder's particularized injury. For the assertion that California First Bank was complicit in the seafood distributor's Ponzi scheme was clearly not a "claim that could be brought by *any* creditor of the debtor." *Folks*, 211 B.R. at 387. It was, instead, only a claim that could be brought by those who had purchased the fraudulent investment contracts.

Indeed, it is a recognized truism that an injury to an insolvent corporation is felt by *all* of the

company's creditors. *Smith v. Arthur Andersen*, 421 F.3d 989, 1004 (9th Cir. 2005). And by recognizing this truism, one sees that the *Folks* standard and the *Williams* standard are, at bottom, one and the same: when a party's acts or omissions harm a corporation or dissipate its assets, then the "claim is a general one, with no particularized injury arising from it . . . that could be brought by any creditor of the debtor." *Folks*, 211 B.R. at 387.

This was, indeed, explained by the Seventh Circuit in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994). Contrary to petitioner's assertions, the *Steinberg* decision also does not present any intra or inter-circuit conflicts, but rather demonstrates that the "conflict" that petitioner relies upon is actually merely an evolution in the legal terminology that is most helpful in understanding and following *Caplin*.

> The point is simply that the trustee is confined to enforcing entitlements of the corporation. He has no right to enforce entitlements of a creditor. He represents the unsecured creditors of the corporation; and in that sense when he is suing on behalf of the corporation he is really suing on behalf of the creditors of the corporation. But there is a difference between a creditor's interest in the claims of the corporation against a third party, which are enforced by the trustee, and the creditor's own direct - ***not derivative*** -

> claim against the third party, which only the creditor himself can enforce.

Steinberg, 40 F.3d at 893, emphasis added.

With its focus on derivative and non-derivative claims, the *Steinberg* decision highlights petitioner's error. As *Steinberg* notes, *Caplin* prevents a trustee from asserting a creditor's *non-derivative* claims. Derivative claims, in contrast, arise from an injury, in the first instance, to the debtor corporation itself. Accordingly, even though that injury will inevitably be felt by the creditors, any causes of action arising from such an injury are owned by the debtor corporation, and are thus properly redressed by the trustee, not individual creditors.

At the level of *substance*, all of the cases agree that the bankruptcy trustee has standing under *Caplin* to pursue derivative claims – that is, claims arising from an injury caused in the first instance to the debtor corporation. *Folks* characterizes such derivative claims as being "generalized" or "general" ones, since a derivative claim harms all creditors. *Williams*, in contrast, uses the same word "general" to refer to a creditor's individual *non-derivative* causes of action.

But even at the level of semantics, the circuit courts are converging, not diverging. For as part of its decision in *Steinberg*, the Seventh Circuit criticized its earlier attempt to distinguish between "particularized injuries" and "general claims" as being unhelpful, and it thus shifted the focus to

whether or not a cause of action arises, in the first instance, because of an injury to or dissipation of assets from a corporation.

The Seventh Circuit has thus moved beyond its earlier use of the term "general" as a reference to derivative claims that impact all creditors. And the Ninth Circuit has followed suit as well, confirming the long established rule that a bankruptcy trustee has standing to assert derivative causes of action, but like *Steinberg*, shifting the focus of the inquiry to the source of the injury from which a cause of action arises:

> Although creditors may attain standing to assert fiduciary duty claims upon a firm's insolvency as a matter of state corporate law, it does not follow that a trustee, who represents the debtor, lacks standing to assert such claims as a matter of federal bankruptcy law. Again, the ultimate question in determining whether a trustee has standing is whether the debtor corporation has been injured.

Smith, 421 F.3d at 1005.

Even the semantic conflicts that petitioner has tried to exploit are dwindling. And because no substantive conflict exists, there are no valid grounds for issuance of a writ of certiorari.

II. THE REMAINING QUESTIONS PRESENTED IN THE PETITION DO NOT IMPACT THE 3DFX D&Os

In seeking review from this Court, petitioner presents three additional questions. None of the three questions impact the 3dfx D&Os.

A. Question 2 of 4 Does Not Apply

As its second question, the petition asks: "Was the Ninth Circuit correct in declining to follow the Second Circuit's *Wagoner* rule?"

Petitioner defines the *Wagoner* rule as stating that "when a bankrupt corporation has joined with a **third party in defrauding its creditors,** the trustee cannot recover against the third party . . ." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991), emphasis added. The directors and officers of a bankrupt corporation, however, cannot be considered "third parties" since a corporation can only act through its officers and directors.

Indeed, the petition itself only presents the *Wagoner* rule as a bar to the trustee's ability to sue nVidia and nVidia's directors and officers. *Petition* at 24.

B. Question 3 of 4 Does Not Apply

As its third question, the petition asks: "As between a Chapter 11 reorganization trustee and a creditor of the estate, does the creditor (landlord) have standing to pursue interference claims against a third part for causing the debtor in bankruptcy (tenant) to breach the lease?"

Again, by its terms this question only relates to claims asserted against "third parties" – a term that does not include the 3dfx D&Os. Indeed, it is hornbook law that the directors and officers of a corporation cannot interfere with the corporation's own contracts. *Marin v. Jacuzzi*, 224 Cal.App.2d 549, 553-554 (Cal. 1964); *Crosstalk Productions v. Jacobson*, 65 Cal.App.4th 631, 646 (Cal. 1998).

Accordingly, as to the 3dfx D&Os, the clear answer to petitioner's question is that *nobody* has standing to pursue claims for any interference with 3dfx's lease.

C. Question 4 of 4 Does Not Apply

As its fourth question, the petition asks: "If a purchase and sale agreement provides that the buyer is purchasing certain assets listed in an exhibit to the agreement, is the buyer's signature on the agreement alone sufficient to satisfy the statute of frauds (rather than requiring the buyer to sign the exhibit as well)?"

The 3dfx D&Os were not parties to the asset purchase agreement. That was an agreement between nVidia and 3dfx. The last question presented by petitioner thus also does not apply to these respondents.

Because these respondents have nothing more than an academic interest in the resolution of the three final questions posed by the petition, they believe the issues raised by those questions are better left to the other respondents to address.

CONCLUSION

For the foregoing reasons, these respondents request that the petition submitted by Carlyle Fortran Trust seeking the issuance by this Court of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

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